89-406

No. _____

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1989

CHESTER W. CAMPBELL,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
COURT OF APPEALS NO. 88-1852

– AND APPENDIX –

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QUESTIONS PRESENTED

I

WHEN A DISTRICT COURT JUDGE FINDS THAT A GOVERNMENT AGENT DELIBERATELY LIED IN HIS AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT, MAY THE DISTRICT JUDGE QUASH THE SEARCH WARRANT AND SUPPRESS THE EVIDENCE AS A SANCTION OR IS HE CONFINED TO EXCLUDING THE LIES IN DETERMINING THE EXISTENCE OF PROBABLE CAUSE?

II

IS THE COMMISSION OF PERJURY BY A GOVERNMENT AGENT IN HIS SEARCH WARRANT AFFIDAVIT AN ATTACK ON THE INTEGRITY OF THE JUDICIAL PROCESS SUCH THAT THE SEVERE SANCTION OF QUASHAL OF THE SEARCH WARRANT AND SUPPRESSION OF THE EVIDENCE SHOULD BE IMPOSED?

III

SHOULD PERJURY BY A GOVERNMENT AGENT IN HIS SEARCH WARRANT AFFIDAVIT EVER BE THE SUBJECT OF 'HARMLESS ERROR' ANALYSIS OR MEASURED AGAINST A 'GOOD FAITH' STANDARD?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COURT OF APPEALS NO. 88-1852

Chester W. Campbell, petitioner, by his attorney, Carl Ziemba, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in Case No. 88-1852 bearing date June 27, 1989. Petitioner's motion for rehearing and suggestion for rehearing en banc was denied by Order dated July 31, 1989.

OPINION BELOW

The opinion of the Court of Appeals has been published: *United States* v *Campbell*, 878 F2d 170 (CA6 1989). A copy of the slip opinion is included in the appendix below. A copy of the Order denying rehearing is also included in the appendix below.

CONSTITUTIONAL PROVISION INVOLVED

Amendment 4, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against un-

reasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF JURISDICTION

The United States Court of Appeals entered judgment in the case at bench on June 27, 1989. Petitioner's motion for rehearing was denied by Order dated July 31, 1989. The jurisdiction of this Court is invoked under 28 USC 1254.

STATEMENT OF THE CASE

In July of 1987, a federal magistrate approved a search warrant for the person of the petitioner and for two cars he was using. The search warrant was executed, and the search netted a pen gun, a derringer pistol, a .25 caliber pistol with a silencer, a .45 caliber semi-automatic pistol, a .22 caliber revolver, a .357 magnum revolver, a .38 caliber revolver, a 12 gauge pump shotgun, a bomb, 785 grams of marijuana, an ounce of cocaine, over 170 grams of heroin, and nearly $11,000 in cash.

Petitioner was indicted for possession with intent to distribute heroin, cocaine and marijuana, in violation of 21 USC 841(a)(1); for possession of an unregistered destructive device, in violation of 26 USC 5861(d); for possession of a firearm with an obliterated serial number, in violation of 26 USC 5861(h); for possession of a firearm with a silencer, in violation of 18 USC 924(c)(1); and as a felon in possession of a firearm in violation of 18 USC 922(g).

Petitioner moved to suppress the evidence seized under the warrant, alleging that judicial approval of the search warrant had been obtained through a supporting affidavit containing deliberate false statements. Following the procedure set forth in *Franks* v *Delaware*, 438 US 154 (1978), the district court held an evidentiary hearing on petitioner's allegations. The district court found that the government agent who had executed the affidavit submitted in support of the issuance of the search warrant had made four deliberate false statements in his affidavit. This finding was not challenged by the government on appeal.

The district judge concluded, however, that under *Franks* v *Delaware, supra*, he had no authority to quash the search warrant and suppress the evidence as a sanction for the deliberate use of false statements by the government agent in his affidavit, but rather that the district court was confined to the procedure of eliminating from the affidavit all of the false statements and then determining whether the remaining allegations constituted probable cause. Although the district judge expressed himself as outraged at the conduct of the government agent and that he was inclined 'to kick this', he did not, for the reason given, and instead determined that the remaining allegations in the affidavit after the falsehoods had been set aside were sufficient to establish probable cause, and he denied petitioner's motion.

After a jury trial, petitioner was found guilty on all counts and the district court sentenced petitioner to 30 years on one of the drug charges and to lesser concurrent sentences on the other charges.

Petitioner appealed his said convictions as a matter of right and a panel of the Court of Appeals affirmed his convictions.

REASONS FOR GRANTING THE WRIT

I

The Court in *Franks* v *Delaware, supra,* stated the question before the Court to be the following:

> 'Does a defendant in a criminal proceeding ever have the right, under the Fourth and Fourteenth Amendments, subsequent to the *ex parte* issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant?' 438 US at 155

The Court answered the question in the affirmative, and then in what might be regarded as *dictum* the Court spelled out what the defendant must do in order to obtain the evidentiary hearing on his allegations that the affiant lied in his affidavit — the filing of affidavits with a pin-pointing of the false statements, and so forth. 438 US at 171. Then the Court said, referring to the things that the defendant had to do to get his evidentiary hearing, the following:

> '[I]f these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, *no hearing is required.*' [emphasis added; footnote omitted] 438 US at 171-172

It is clear that the Court's main concern was the establishment of probable cause in the affidavit. In the Court's view, lies in an affidavit cannot contribute to the establishment of probable cause. But, the Court was taking a pragmatic position in view of its concern with the establishment of probable cause: if the allegations in the affidavit apart from the lies in the affidavit

establish probable cause, why have an evidentiary hearing to establish that the alleged lies were lies? But, the Court, it is clear, was not considering whether any other sanctions could and should be applied when it is established that a government agent has lied in his affidavit apart from the rather obvious sanction of eliminating the lies from consideration when determining probable cause.

Earlier in its opinion in *Franks*, the Court laid down the following principle:

> 'In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.' 438 US at 156

This is hardly a startling proposition. What the Court is saying is that if there are not sufficient facts alleged in the affidavit to establish probable cause, the search warrant must be quashed and the evidence suppressed and that lies are not facts.

The foregoing pronunciamentos of the Supreme Court somehow got turned around by the learned judges of the panel in the case at bench to mean the following: In all cases where it is proven on an evidentiary hearing that an affiant for a search warrant committed perjury in his affidavit, the only course the district judge may follow is to excise the perjurious material from the affidavit and determine whether the remaining allegations establish probable cause and if

they do, the search warrant stands, and if they do not, the search warrant falls and that is the end of the matter.

Petitioner in the case at bench cited to the panel the case of *United States* v *Luna*, 525 F2d 4, 8-9 (CA6 1975) where the Court said:

> 'There are two circumstances which we believe authorize the impeachment of an affidavit which on its face is sufficient probable cause for issuance of the warrant. The first of these consists of knowing use of a false statement by the affiant with the intent to deceive the court. This is true even if the statement can be said to be immaterial to the issue of probable cause. In our judgment such perjury must lead to suppression of the evidence in order to prevent fraud upon the judicial process.
>
> * * *
>
> 'As we see the matter, the suppression rule can hardly be expected to prevent human error. It should be employed to strike down perjury and to promote careful police work.'

The panel in the case at bench held that *United States* v *Luna* was overruled by *Franks* v *Delaware:*

> 'The question presented in the case at bar is whether *Luna* survived *Franks*. We conclude that it did not.' [Slip Opinion, A-5]

Petitioner also cited to the panel in the case at bench the case of *United States* v *Leon*, 468 US 897, 923 (1984) where the Court, referring to *Franks* v *Delaware*, specifically stated that the principle of good faith reliance upon a search warrant by a police officer will not apply in cases where the officer made deliberate false statements in his affidavit and that suppression of

the warrant and of the evidence remains the appropriate remedy:

> '*Suppression therefore remains an appropriate remedy* if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. *Franks* v *Delaware*, ...' [emphasis added]

Although the panel in the case at bench cited *United States* v *Leon* [Slip Opinion, A-6], it was not in connection with the issue in question.

The petitioner cited to the panel in the case at bench the case of *United States* v *Savoca*, 761 F2d 292, 296 (CA6 1985) where the Court held that in light of *United States* v *Leon, supra*, the Court's holding in *United States* v *Luna, supra*, was valid:

> 'In analyzing the good faith exception, the Court [in *Leon*] identified three pragmatic situations in which a search pursuant to a warrant may be held to be illegal. First, if a warrant is based on a knowing or reckless falsehood contained in the supporting affidavit, the warrant is invalid under *Franks* v. *Delaware*, 438 U.S. 154 (1978). See *Leon*, 104 S. Ct. at 3417. *In this situation, there is necessarily police misconduct which can and ought to be deterred and "[s]uppression . . . remains an appropriate remedy."* Id. 104 S. Ct. at 3421-22.' [emphasis added]

In its opinion, the panel in the case at bench did not cite nor advert in any manner to *United States* v *Savoca*.

Thus, it is respectfully urged that the panel erred in its holding that *Franks* v *Delaware, supra*, mandates

that the only procedure to be followed by a district judge when it is proven to his satisfaction that the affiant committed perjury in his affidavit is the excision of the perjurious matter and a determination of probable cause on the basis of the remaining allegations.

II

The affidavit in question in the case at bench was sworn to by an FBI agent. It was drafted by the FBI agent and an assistant United States attorney working together and assisting one another.

Prior to trial the petitioner complained in a motion to the district judge that the affidavit contained lies. The district judge said you will have an evidentiary hearing. On the first day of the evidentiary hearing, the FBI agent who was the affiant was called as a witness. Certainly, the FBI agent knew what the purpose of the evidentiary hearing was prior to his taking the witness chair. Still at the outset of his testimony the FBI agent didn't state to the court 'Your Honor, I should like to call the court's attention to the several untrue statements which I made in the affidavit'. Instead, in answer to certain questions put to him by the court, the FBI agent disputed with the court the meaning of the statements made in the affidavit which meaning seemed clear to the court. On the following day upon resumption of the evidentiary hearing, the court on its own motion recalled the FBI agent to the witness chair and through questioning established by the agent's admissions that the agent had made *two* false statements knowingly and deliberately in the affidavit. Subsequently, the government in a supplemental brief to the court acknowledged that the FBI agent had made a *third* false statement knowingly in the affidavit, and the court found on the basis of the testimony that the

FBI agent had made a *fourth* false statement knowingly in the affidavit.

Whatever gloss might be put on it, the fact remains that the FBI agent committed four acts of perjury when he knowingly made four false statements in his affidavit. The making of a '[d]eliberate material falsification under oath constitutes the crime of perjury and the crime is complete when a witness' statement has once been made' and '[p]erjury has been a common-law crime since at least the Seventeenth Century'; and '[p]erjury is an obstruction of justice; its perpetration well may affect the dearest concerns of the parties before a tribunal', *United States* v *Norris*, 300 US 564, 574 (1937).

The district court found that in four paragraphs of the affidavit the FBI agent knowingly falsely stated that there were four unnamed individuals who gave reliable information to FBI informants. These four individuals did not exist; they were entirely fictitious. On the evidentiary hearing, the FBI agent affiant stated that, in regard to the two fictitious persons about whom he admitted that he had lied, that he so lied in order to protect his informants. The panel judges accepted this explanation as a laudable reason for the FBI agent's making four perjurious statements. Thus, we have the interesting phenomenon of a confessed perjuror's self-serving statement being accepted as a proper justification of his perjury. See Slip Opinion, A-6.

The district judge was not so charitable and he surely would have suppressed the evidence if he didn't feel constrained by his interpretation of *Franks* v *Delaware* that he didn't have authority to do so:

> 'Now, I will tell you quite candidly, gentlemen, my present posture and thinking on this is to

> kick this. I don't like what took place here at all and I appreciate Mr. Bresnahan's [the FBI agent] motives may have been of the highest but it was a stupid, careless, if not reckless and deliberate falsehood which was perpetrated on the Magistrate and on this Court up (sic); until yesterday when the cat got out of the bag.'

The Court in *Franks* v *Delaware*, 438 US at 168-169 gave reasons why it was absolutely essential that a government agent be truthful in his allegation in an affidavit for a search warrant: '[t]he pre-search proceeding is necessarily *ex parte*'; '[t]he magistrate has no acquaintance with the information that may contradict the good faith and reasonable basis of the affiant's allegations'; '[t]he requirement that a warrant not issue "but upon probable cause, supported by Oath or affirmation" [will] be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile'.

Some courts regard perjury in a search warrant affidavit as an offense against the constitution and an offense against the judicial system. Thus, the Court in *United States* v *Cortina*, 630 F2d 1207, 1213, 1214 (CA7 1980) said in considering a falsehood made in a search warrant affidavit:

> 'When Brown lied to the magistrate, therefore, he committed two offenses: one against the constitutional guarantee against unreasonable searches, and a second against the judicial system.
>
> * * *
>
> 'Brown willfully disobeyed the law in two ways: he lied in the affidavit, and he lied on the wit-

> ness stand. The call for the court's supervisory power under these circumstances is at its strongest and most defensible. *The judicial system itself has been defrauded.*' [emphasis added]

And in *People* v *O'Neill*, 482 NE2d 668, 674 (Ill App 1st Dist 1985), in like circumstances the Court stated:

> '[T]he evidence established that Detective Weber's affidavit contained material falsehoods. Thus, *fraud had been perpetrated against the court.*' [emphasis added]

Judge Keith in dissent in *United States* v *Barone*, 584 F2d 118, 127 (CA6 1978) expressed himself as follows on the subject:

> 'The *Franks* decision set a minimum constitutional standard under which the Fourth Amendment mandates suppression of seized evidence in state and federal prosecutions. In my view *Franks* does not invalidate the concern expressed in this Circuit's decision in *Luna* that where a falsely drawn affidavit perpetrates fraud upon and makes a mockery of the judicial process, the affidavit may be impeached.'

On the evidentiary hearing, the assistant United States attorney who assisted the FBI agent in drafting the affidavit testified that he had discussed the matter with the agent and indicated that 'I would have preferred direct testimony about the possession of the firearm as opposed to third-party hearsay. So, it was my understanding that there was someone else who stood as an intermediary'. Thus, we have the unedifying situation where an FBI agent who has sworn to uphold the constitution and laws of the United States lying to the assistant United States attorney who helped him draft

his affidavit, lying to the United States Magistrate who issued the warrant and lying to the district judge on the evidentiary hearing.

'Plainly, our judicial system cannot, and should not, tolerate, acquiesce in, or be an accessory to such practices.' *People* v *Garcia*, 440 NE2d 269, 274 (App Ct Ill 1st 1982).

III

In reaching the decision in the case at bench, the panel seems to have applied the following four principles in evaluating the character of perjury of the FBI agent: (1) he lied in good faith; (2) his lies were 'harmless error'; (3) his lies were immaterial; (4) the defendant is a 'bad man'.

That the panel applied some novel principle that lying in a judicial proceeding is acceptable if done in good faith is suggested by the following statement: '[T]he affiant whose affidavit led to the discovery of Campbell's bomb, guns and drugs was so fearful of the safety of his informants that he chose to dilute his affidavit with a layer of fictitious hearsay.' [Slip Opinion, A-6]

That the panel applied a 'harmless error' principle is suggested by the following statement: 'To require that a warrant be voided and all evidence seized thereunder be suppressed because of immaterial false statements would fly in the face of the harmless error rule'. [Slip Opinion, A-7]

That the panel applied a rule of materiality of the lies is suggested by the foregoing quoted sentence and the following: 'We also note that the materiality rule is consistent with our construction of federal statutes criminalizing false statements.' [Slip Opinion, A-7]

That the panel applied the 'bad man' principle is suggested by the following statement: '[W]e cannot muster much enthusiasm for returning a man like Mr. Campbell to the streets because the affiant . . . was so fearful of the safety of his informants that he chose to dilute his affidavit with a layer of fictitious hearsay'. [Slip Opinion, A-6]

The panel opinion it would seem sends the wrong message to law enforcement officers; it encourages them to lie in affidavits for search warrants if their motives are 'pure'; and if the motive is to 'get' a 'bad man', the lie will be forgiven. It would seem that the federal courts are powerless to protect persons who cooperate with the government in apprehending wrongdoers and that task must be taken over by the individual law enforcement officer. But, as the Court said in *McDonald* v *United States*, 335 US 451, 456 (1948): 'Power is a heady thing; and history shows that the police acting on their own cannot be trusted'.

Throughout its history in the lower court, this case has been tainted by the perjury of an agent of the United States government who had sworn to uphold the constitution and laws of the United States. 'The dignity of the United States Government will not permit the conviction of any person on tainted testimony.' *Mesarosh* v *United States*, 352 US 1, 9 (1956).

What the panel in the case at bench has overlooked is that the FBI agent's four instances of perjury in his affidavit casts his general credibility in the gravest doubt. And with it the reliability of *all* of his allegations in the affidavit. In a similar context, the Court in *People* v *Cook*, 583 P2d 130, 140-141 (Cal 1978), made the following eminently sensible statements:

> 'If the magistrate had known the officer was deliberately lying to him in making certain of

> the allegations in the affidavit, he might well have disbelieved some or all of the remainder. His ignorance of this crucial fact undermines his determination of the officer's credibility, and the reviewing court can no longer rely on that determination for the facts necessary to test the magistrate's conclusion of probable cause. In short, although the court can excise the intentional false allegations it cannot presume the remainder to be true.' [footnotes omitted]

Not only did the panel in the case at bench presume that all of the allegations in the affidavit apart from the four perjurious statements were true, but the panel accepted at face value and as true the agent's explanation as to why he made four perjurious statements in his affidavit. This is quite a reward to the perjuring officer; and a blanket encouragement to all government agents to lie in their affidavits. Not only will no dire consequences result, but they might get a solicitous pat of approbation on the head.

Since the making of four lies knowingly in one affidavit casts serious doubts on the integrity and credibility of the affiant, and since the credibility of the affiant in the *ex parte* procedure of issuing of search warrants is the *sine qua non*, it is truly difficult to understand how the panel could view the four perjurious statements as not material and subject to a harmless error analysis. Can the false postulating of four informants in an affidavit presented to a federal magistrate who has the duty of determining the credibility of the affiant and the informants from whom information was gained and of determining probable cause ever be regarded as proper subject for harmless error analysis?

No principle in our system of criminal jurisprudence is better established than that which holds that there is not one set of rules for the guilty and another set of rules for the innocent; there is but one set of rules and they are applied in equal measure to the guilty and to the innocent. If we do not accord the same advantages of the rules to the guilty and to those who are perceived to be 'bad men', then there exists the danger that we will not accord the advantages of the rules to the innocent. 'The protection of the Fourth Amendment extends to all equally — to those justly suspected or accused, as well as to the innocent.' *Agnello* v *United States*, 269 US 20, 32 (1925).

RELIEF SOUGHT

Petitioner respectfully prays that this Court issue its Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: August 31, 1989

APPENDIX

OPINION

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed June 27, 1989)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHESTER W. CAMPBELL, Defendant-Appellant — No. 88-1852; ON APPEAL from the United States District Court for the Eastern District of Michigan)

Before: MILBURN and NELSON, Circuit Judges, and PECK, Senior Ciorcuit Judge.

DAVID A. NELSON, Circuit Judge.

The question presented in this case is whether deliberate false statements in an affidavit supporting an application for a search warrant compel the voiding of the warrant even if the false statements are unnecessary to a finding of probable cause. We believe the Supreme Court answered that question in the negative in *Franks* v. *Delaware*, 438 U.S. 154 (1978), and we conclude that this court's contrary decision in *United States* v. *Luna*, 525 F.2d 4 (6th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976), has been effectively overruled. In the case at bar the district court set the falsehoods to one side and evaluated the sufficiency of the affidavit on the basis of what was left. That, we believe, was the correct procedure.

I

In July of 1987, a federal magistrate approved a search warrant for the person of defendant Chester Campbell and two cars Campbell was using. The government's application for the search warrant was supported by an

affidavit, sworn to by an FBI agent, relating that three independent, reliable informants had seen the defendant carrying various firearms on a number of occasions. Two informants were also said to have learned from unidentified third persons that Campbell routinely carried firearms.

The warrant was promptly executed, and the search turned up a pen gun, a derringer pistol, a .25 caliber pistol with a silencer, a .45 caliber semi-automatic pistol, a .22 caliber revolver, a .357 magnum revolver, a .38 caliber revolver, a 12 gauge pump shotgun, a bomb, 785 grams of marijuana, an ounce of cocaine, over 170 grams of heroin, and nearly $11,000 in cash. Campbell was indicted for possession with intent to distribute heroin, cocaine, and marijuana, in violation of 21 U.S.C. § 841(a)(1); for possession of an unregistered destructive device, in violation of 26 U.S.C. § 5861(d); for possession of a firearm with an obliterated serial number, in violation of 26 U.S.C. § 5861(h); for possession of a firearm with a silencer, in violation of 18 U.S.C. § 924(c)(1); and as a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). (The indictment charged seven previous felony convictions, including a conviction for second-degree murder.)

The defendant moved to suppress the evidence seized under the warrant, alleging that judicial approval of the search warrant had been ottained through a supporting affidavit containing deliberate false statements. Following the procedure set forth in *Franks* v. *Delaware*, *supra*, the district court held an evidentiary hearing on the defendant's allegations. The district court found that the affidavit contained four deliberate false statements; that finding is not challenged here. All four falsehoods involved the invention of fictitious persons to mask the identity of government informants. In the

following representative averment, for example, the information provided by Informant 3 was in fact based on what Informant 3 had heard directly from defendant Campbell, rather than from an unidentified "individual" interposed between defendant Campbell and Informant 3:

> "FBI-3 further advised this affiant that FBI-3 learned from an individual who was told by CHESTER CAMPBELL that CHESTER CAMPBELL, when in his vehicle, will conceal a firearm in a location inside the vehicle where it can be easily and quickly reached by CAMPBELL."

The district court concluded that the affidavit's remaining content sufficiently established probable cause, and the court denied the motion to suppress. After a jury trial, the defendant was found guilty on all counts. The district court sentenced the defendant to 30 years on one of the drug charges; lesser sentences, to run concurrently, were imposed on the various other charges. This appeal followed.

II

The Supreme Court addressed the problem of partially false search warrant affidavits in *Franks* v. *Delaware*, 438 U.S. 154 (1978). The Court held there that a defendant is entitled to an evidentiary hearing on the veracity of the statements of the affiant in a warrant affidavit if and only if (1) there is a substantial preliminary showing that specified portions of the affiant's averments are deliberately or recklessly false *and* (2) a finding of probable cause would not be supported by the remaining content of the affidavit when the allegedly false material is set to one side. "[I]f, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient

content in the warrant affidavit to support a finding of probable cause, no hearing is required." *Id.* at 171-172.

The Court described the defendant's burden at the hearing as follows:

> "In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, *with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause,* the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

Id. at 156 (emphasis supplied).

The Supreme Court has also applied the *Franks* principle where a warrant has been approved in reliance on an affidavit containing information obtained through illegal surveillance. See *United States* v. *Karo*, 468 U.S. 705, 719 (1984), where the Court held that warrantless monitoring of a beeper in a private residence violated the Fourth Amendment, but that a warrant obtained on the strength of an affidavit containing information gathered through such surveillance was nevertheless valid "if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause."

Every other circuit has read *Franks* to require that a deliberate falsehood be material if the warrant is to be voided because of falsehood. See *United States* v. *Paradis*, 802 F.2d 553, 558 (1st Cir. 1986); *United States* v. *Ferguson*, 758 F.2d 843, 849 (2d Cir.), *cert. denied*, 474 U.S. 841 (1985); *United States* v. *Calisto*, 838 F.2d 711, 714-16 (3rd Cir. 1988); *United States* v. *Taylor*, 857 F.2d 210, 215 (4th Cir. 1988); *United States* v. *Cuevas-*

Sanchez, 821 F.2d 248, 252 (5th Cir. 1987); *United States* v. *Malsom*, 779 F.2d 1228, 1235 (7th Cir. 1985); *United States* v. *Leisure*, 844 F.2d 1347, 1357 (8th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 324 (1988); *United States* v. *Whitworth*, 856 F.2d 1268, 1280-81 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1541 (1989); *United States* v. *Barrera*, 843 F.2d 1576, 1580 (10th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 153 (1988); *United States* v. *Kirk*, 781 F.2d 1498, 1505-06 (11th Cir. 1986); *United States* v. *Richardson*, 861 F.2d 291, 294 (D.C. Cir. 1988) (per curiam), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1325 (1989).

The defendant relies on a pre-*Franks* Sixth Circuit case, *United States* v. *Luna*, 525 F.2d 4 (6th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976), where we declared that "knowing use of a false statement by the affiant with intent to deceive the court . . . must lead to suppression of the evidence in order to prevent fraud upon the judicial process," suppression being required "even if the statement can be said to be immaterial to the issue of probable cause." *Id.* at 8. The question presented in the case at bar is whether *Luna* survived *Franks*. We conclude that it did not.

We found it unnecessary to decide the question in *United States* v. *Barone*, 584 F.2d 118 (6th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979), since the false statements in *Barone* were not intended to deceive the trial judge and thus did not require suppression even under the stricter standard of *Luna*. Although the court in *Barone* was at pains to say that it would reach the same result under either *Luna* or *Franks*, 584 F.2d at 122, a number of more recent decisions, one of which was written by the author of *Luna*, have implicitly repudiated the rule of the earlier case. See *United States* v. *Jenkins*, 728 F.2d 396, 397 (6th Cir. 1984) ("an

affidavit . . . may be challenged successfully only on proof that it contains 'deliberate falsehood or reckless disregard for the truth' without which the affidavit would be an insufficient basis for the warrant"). In *United States* v. *Sangineto-Miranda*, 859 F.2d 1501, 1514 (6th Cir. 1988), the court noted that even if a particular statement in an affidavit were false (a contested issue in that case), the remaining content of the affidavit was sufficient to establish probable cause. And in *Yancey* v. *Carroll County*, __ F.2d __, __ (6th Cir. April 10, 1989), a civil rights case brought against police officers, we wrote that "an officer cannot rely on a judicial determination of probable cause if that officer knowingly makes false statements to the judge such that but for these falsities the judge would not have issued the warrant."

The defendant argues that while *Franks* requires the lower courts to void warrants under conditions that may not be present here, it does not preclude the lower courts from voiding warrants where *Franks* would not require that result. Thus we are asked to exercise our supervisory power to continue to enforce the stricter *Luna* test in this circuit. We decline to do so. The exclusionary rule has serious social costs, as recent Supreme Court cases have repeatedly emphasized, see, *e.g.*, *United States* v. *Leon*, 468 U.S. 897, 908-13 (1984), and we cannot muster much enthusiasm for returning a man like Mr. Campbell to the streets because the affiant whose affidavit led to the discovery of Campbell's bomb, guns and drugs was so fearful of the safety of his informants that he chose to dilute his affidavit with a layer of fictitious hearsay. *Luna* was concerned with the problem of deliberate lies made to strengthen the government's showing of probable cause. The false statements in the present case, while deliberate, were not made to bolster the showing of probable cause — and it

would be more than a little anomalous to void a warrant because it understated the government's case.

It is clear that we are not free to use our supervisory power in a way that "would conflict with the harmless error inquiry mandated by the Federal Rules of Criminal Procedure." *Bank of Nova Scotia* v. *United States*, ___ U.S. ___, ___, 108 S.Ct. 2369, 2373 (1988); see also *United States* v. *Hasting*, 461 U.S. 499 (1983). To require that a warrant be voided and all evidence seized thereunder be suppressed because of immaterial false statements would fly in the face of the harmless error rule. We also note that the materiality rule is consistent with our construction of federal statutes criminalizing false statements. See *United States* v. *Adams*, 870 F.2d 1140 (6th Cir. 1989) (perjury); *United States* v. *Abadi*, 706 F.2d 178 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983) (false statements in matters within jurisdiction of federal agency); see also *United States* v. *Korman*, 614 F.2d 541, 551 (6th Cir.) (Merritt, J., dissenting) ("A rule requiring automatic suppression without regard to the materiality of false information in a search warrant affidavit would be overkill just as would conviction of securities fraud or perjury for irrelevant misrepresentation."), *cert. denied*, 446 U.S. 952 (1980).

III

We turn now to the question whether the untainted portion of the affidavit in this case sufficiently supported a finding of probable cause under the "totality of the circumstances" test enunciated in *Illinois* v. *Gates*, 462 U.S. 213, 238-39 (1983). Setting to one side the false statements, the district court concluded that the five totally truthful paragraphs of the affidavit contained sufficient information to justify a finding of probable cause. We agree.

The defendant makes two main arguments on the probable cause issue. First, he argues that since the affidavit here was drafted by an agent who had graduated from law school, aided by a federal prosecutor, the warrant should be held to a higher standard than other warrants. We reject this novel argument. All sworn statements ought to be truthful, and lay people know this as well as lawyers do. Untruths must be disregarded whatever the background of the affiant. Once tainted statements have been set aside, the sufficiency of the balance must be determined on its merits, and not on the basis of how culpable we think the affiant is for forswearing himself.

The defendant also plays a game of flyspecking that almost no affidavit could withstand. The defendant's analysis of one typical paragraph of the affidavit will serve to illustrate the technique. Paragraph 4(g) of the affidavit reads:

> "During the first week in April, 1987, FBI-3 advised the affiant that FBI-3 has known CHESTER CAMPBELL for several years and FBI-3 knows through personal knowledge and observation that CHESTER CAMPBELL carries a firearm when he leaves his residence, especially at night. FBI-3 has observed on several occasions CHESTER CAMPBELL have in his possession various firearms, described as handguns and shotguns."

The defendant deals with this paragraph as follows:

> "What can the first sentence of the above paragraph possibly mean? Does it mean that every time the defendant leaves his home he carries a firearm? Does this mean that during the several years referred to, the defendant carried a firearm when he left his home? How did FBI-3 know that? Was he present each and every time

> defendant left his home during these several years? And how long is several years? What does the phrase 'especially at night' mean? If defendant carries a firearm every time he leaves his home, this means both day and night. There is no need to state 'especially at night.' . . . And when was the last time that FBI-3 observed the defendant leave his home carrying a firearm. FBI-3 can truthfully claim to have known defendant for 'several years' and still not even seen [sic] the defendant for the past 'several years' of the 'several years' that he has known defendant . . . ."

This is precisely the sort of hair-splitting analysis the Supreme Court has directed the lower courts to eschew in favor of a common sense "totality of the circumstances" test. The untainted paragraphs of the affidavit contain information from three independent, reliable informants concerning the defendant's routine possession of firearms on his person. These paragraphs amply support a finding of probable cause.

The district court properly denied the defendant's motion to suppress. The defendant's conviction is **AFFIRMED**.

ORDER

(United States Court of Appeals — Sixth Circuit)

(Filed July 31, 1989)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHESTER W. CAMPBELL, Defendant-Appellant — No. 88-1852)

Before: MILBURN and NELSON, Circuit Judges; and PECK, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk